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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUN 13 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of Part 73 of the) MM Docket No. 95-40
Commission's Rules Concerning)
the Filing of Television Network) DOCKET FILE COPY ORIGINAL
Affiliation Contracts)

INFORMAL COMMENTS OF AFLAC BROADCAST GROUP, INC.

AFLAC Broadcast Group, Inc. ("AFLAC"),^{1/} by its counsel, hereby submits its Comments in response to the Commission's Notice of Proposed Rule Making, ("NPRM") (released April 5, 1995), in the above-captioned proceeding and requests that they be included in the record. AFLAC strongly opposes elimination or dilution of the current requirement that television network affiliation agreements be filed with the Commission and be made available for public inspection.

Requiring that network affiliation agreements be produced only upon the Commission's request, as the Commission has proposed, would eliminate virtually any ability on the part of the Commission, the broadcasting industry, or the general public to enforce the requirements of the Commission's other network/affiliate rules. Even now, AFLAC believes the filing requirement and other network/affiliate rules are being violated

^{1/}Through its affiliated entities, AFLAC owns and operates the following network affiliated television stations: KWWL(TV), Waterloo, Iowa; WAFF(TV), Huntsville, Alabama; WAFB-TV, Baton Rouge, Louisiana; WTOG-TV, Savannah, Georgia; KFVS-TV, Cape Girardeau, Missouri; WTVM(TV), Columbus, Georgia; and WITN-TV, Washington, North Carolina.

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with relative impunity, without any effective enforcement action by the Commission. If the filing requirement is eliminated, there will be absolutely no incentive for the networks to comply with those rules and no practical way in which to enforce them.

Accordingly, AFLAC urges the Commission to retain the current requirement for the filing of network affiliation agreements and, equally importantly, to resume enforcing this requirement and the rest of its network/affiliate rules.

I. THE CURRENT REQUIREMENT THAT NETWORK AFFILIATION AGREEMENTS BE FILED WITH THE COMMISSION SERVES THE PUBLIC INTEREST AND SHOULD BE RETAINED.

The current filing requirement is there for a reason -- so long as it is enforced, it provides the Commission and others with the ability to ensure that the Commission's substantive requirements governing the network/affiliate relationships are not violated. See NPRM at ¶ 9.^{2/} The primary purpose of the Commission's network/affiliate rules, in turn, is "to restrict the potential exercise of market power of networks over their affiliates to the detriment of the public." Id. at ¶ 10.

Absent a requirement that all television network affiliation agreements be filed with the Commission, AFLAC

^{2/}Because of the interrelationship between the filing requirement and the Commission's substantive network/affiliate rules, AFLAC, by letter of June 5, 1995, asked the Commission to consolidate the various network/affiliate proceedings or to set simultaneous filing dates in those proceedings. Although the Commission denied AFLAC's request, AFLAC continues to believe that the issues presented in this proceeding cannot logically be resolved until the Commission has first completed its examination of the underlying network/affiliate rules.

believes that there will be no realistic way of enforcing the substantive requirements of the Commission's network/affiliate rules, thus increasing the chances that abuses of network power over affiliates will go undetected and unchecked. Elimination of this requirement thus would cause a shift of power to the national networks, and away from local television broadcasters, with adverse consequences for the public interest.

AFLAC submits that the protections provided by the Commission's network/affiliate rules are needed now more than ever. Although it is true, as the Commission observed, that the video marketplace has changed in recent years, these changes have caused the television networks to move aggressively to own or otherwise control their affiliated stations in order to avoid having to negotiate with over 200 local television station managers, each of whom is concerned with his or her own local market.

The networks are pursuing this agenda on Capitol Hill, at the FCC, and in their negotiations with their affiliated stations over new network affiliation agreements. The fact is that rather than negotiate with affiliates and treat them as equal partners, the networks would prefer to own their station outlets or to be in a position to dictate terms to the remaining non-owned affiliates. If the network efforts to achieve a chokehold over their affiliates are successful, it will mean nothing less than the loss of the localism and diversity which are at the heart of the American broadcast system.

The present relationship between the networks and their affiliates, in which both sides have roughly equivalent bargaining power, serves those interests relatively well -- but it is one that the networks clearly wish to change. As presently constituted under the Commission's network/affiliate rules, the networks provide high quality entertainment, sports, and national news programming, which individual stations could not otherwise afford to purchase, while preserving the editorial discretion of local stations to carry programming responsive to their local communities and to reject network programming that they deem inappropriate.

Central to that current balance of power is the free flow of information to both sides -- the networks and the affiliates. As the Commission noted in its NPRM, the networks necessarily are privy to comprehensive data on the whole range of issues typically covered in network affiliation agreements. The current filing requirement attempts to level the playing field between the networks and the affiliates by providing a mechanism whereby individual stations can obtain the same information. It has long been said that "information is power" and without the information provided by being able to review the network affiliation agreements on file with the FCC, that power unquestionably will shift back to the networks.

Such a shift in power would adversely affect the affiliates' bargaining position on a number of issues, including

the right of network affiliates to preempt network programming. Even now, that right is under heavy attack by the networks.

For example, in the fall, AFLAC's station in Savannah, Georgia, WTOC-TV (a CBS affiliate), runs a weekly station-produced show from 11:30 p.m. to midnight each Friday during football season, featuring highlights from that evening's local high school football games. This show is so popular with the local high school students that WTOC-TV has been commended for helping to keep teenagers off the streets after the games -- they return to their homes after the games to watch the highlights on WTOC-TV. Although WTOC-TV's community of license may be pleased with WTOC-TV's programming decision, CBS is not because, as a result of WTOC-TV's decision to carry this widely viewed local program, the start of David Letterman's show, which WTOC-TV obtains from CBS, is delayed for 30 minutes.

In contrast to WTOC-TV's local football program, from which CBS does not derive any revenue, CBS obtains substantial revenue from the Letterman show. Thus, notwithstanding the fact that WTOC-TV's locally produced show provides a significant and demonstrable public benefit, as well as the fact that the Letterman show draws less than half the size audience as WTOC-TV's local football highlights (a 3 rating for Letterman versus a 9 rating for WTOC-TV's football show) CBS has exerted considerable pressure on WTOC-TV to abandon its local football show in order to broadcast the Letterman show at 11:30 p.m.

Although WTOC-TV has thus far been able to resist that pressure because it is a strong station, the networks are taking steps to ensure that local stations such as WTOC-TV do not retain the ability to preempt or reschedule network programming. For example, in the current negotiations with its affiliated stations concerning new network affiliation agreements, NBC is seeking to prevent stations from preempting network programming except for "breaking news stories." The model agreement which NBC is promoting also would preclude stations from preempting network programming based on ratings, audience reaction, or the availability of other programming which the station believes would be more profitable.

The agreement further provides that if a station preempts network programming more than a limited number of hours per year, it not only loses network compensation for the programs that it did not broadcast but must compensate the network for the station's share of any revenue lost by the network as a consequence of the station's preemption decisions.

Preservation of the current "sunshine" requirement for network affiliation agreements is absolutely critical to any effective enforcement of the current network/affiliate rules. Without that requirement, and without Commission action to enforce compliance with it, there will be no way for the Commission, the broadcasting industry, or the general public to know whether the Commission's substantive requirements are being observed. How, for example, can the right of affiliates to

reject network programming (now mandated by Section 73.658(e) of the Commission's Rules) be preserved if network affiliation agreements need not be filed?

Even now, although the filing requirement continues to exist, AFLAC believes that efforts are underway to avoid complying with it. For example, AFLAC understands that at least one television network now is routinely insisting that financial terms be redacted from the copy of the affiliation agreement filed with the Commission and that certain other terms covered as part of the network/affiliation negotiating process be placed in "side letters" which are not filed with the Commission.

AFLAC's belief that the filing requirement is being violated is further supported by its own attempt to obtain from the Commission's files copies of the network affiliation agreements applicable to the stations operated by a major broadcast group. AFLAC's research disclosed that the stations owned by that group had filed with the Commission relatively short, boilerplate agreements containing only general terms and conditions. Based upon AFLAC's own experience in operating stations affiliated with each of the three major television networks, and its consequent familiarity with the issues customarily covered by network affiliation agreements, AFLAC has no doubt that the documents filed with the Commission by those stations did not reflect the entire understanding between the stations and the network.

The failure to include those other terms and conditions in the documents filed with the Commission plainly violates both the letter and the spirit of Section 73.3613(a), which requires that network affiliation contracts, agreements, and understandings be reduced to one written document and filed with the Commission. Yet, so far as AFLAC is aware, the Commission has not taken any action in such cases to enforce compliance with its current filing requirement. Moreover, given the apparent ease with which the filing requirement is being violated, it is not unreasonable to suppose that the substantive requirements imposed by the Commission's underlying network/affiliate rules also are being breached with fair regularity.

In view of the difficulties in enforcing even its present requirements, the enforcement mechanism posited by the Commission in the absence of a filing requirement -- complaints by affiliates or from the general public -- is simply unrealistic. Without a filing requirement, even well-informed members of the general public will not have sufficient information to file such a complaint and it would be extraordinary for an affiliate, except in the most exceptional of circumstances, to "rock the boat" by filing a complaint at the Commission against the source of most of its entertainment, sports, and news programming.

AFLAC also opposes the Commission's alternate proposal to permit the redaction of financial and other "business sensitive terms" from network affiliation agreements before they

are made available for inspection. As the Commission is well aware, the financial terms are at the heart of any agreement. Allowing the removal of such terms from the public file documents would permit the networks to effectively violate the Commission's substantive network/affiliate rules, without exposing such conduct to public scrutiny. For example, even without specific language restricting the right of an affiliate to preempt network programming, the network affiliation agreement could impose punitive financial penalties upon an affiliate for preempting network programming. Indeed, as noted above, NBC is asking its affiliates to enter into an agreement which contains just such a provision.

In AFLAC's view, such financial penalties for failing to clear network programming would violate Section 73.658(e) of the Commission's Rules. However, if redaction of financial terms were permitted, this violation would be likely to go uncorrected because the relevant terms of the affiliation agreement would no longer be subject to public review.

In sum, AFLAC believes that the current filing requirement for network affiliation agreements provides a significant public interest benefit. The Commission's speculation that this requirement somehow engenders anti-competitive conduct among the affiliates is completely without factual basis. To the contrary, eliminating the filing requirement would facilitate anti-competitive conduct on the part of the networks by ensuring that only they, and not the

affiliates or the Commission, would possess complete and accurate information about network/affiliate contracts.

Moreover, the cost imposed upon television licensees by the current requirement is exceedingly small. The current rules require only that each television broadcast licensee file with the Commission a copy of any network affiliation agreement to which is subject. The rule does not require that the licensee submit any additional analysis or explanation with the agreement -- only that the agreement itself be filed.

CONCLUSION

AFLAC submits that the answer to the question posed by the Commission is absolutely clear: the present requirement that television network affiliation agreements be filed with the Commission, in their entirety, should be retained and enforced by the Commission.

Respectfully submitted,

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